

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BRYANNA BERRY,
Plaintiff,

v.

CITY OF SAN JOSE, et al.,
Defendants.

Case No. 21-cv-08436-VKD

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Re: Dkt. No. 31

Plaintiff Bryana Berry filed this civil rights action pursuant to 42 U.S.C. § 1983, claiming that defendants City of San Jose (“City”) and San Jose Police Officer Lindsay Parodi violated her civil rights. Defendants now move pursuant to Rule 12(b)(6) to dismiss the fifth, sixth and seventh claims for relief asserted in Ms. Berry’s First Amended Complaint (“FAC”). The seventh claim for relief is a *Monell*¹ claim asserted against the City. At the April 19, 2022 motion hearing, plaintiffs confirmed that all other claims asserted against the City (i.e., Claims 2 through 6) are based on *Monell* liability, and the City confirmed that in moving to dismiss Claim 7, it in effect seeks dismissal of all claims asserted against it. Dkt. No. 35.

Upon consideration of the moving and responding papers, as well as the oral arguments presented, the Court grants defendants’ motion to dismiss in part and denies it in part, with leave to amend.²

¹ *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

² All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 11, 21.

I. BACKGROUND

The following background facts are drawn from the FAC's factual allegations, which for present purposes, are deemed true.

On the evening of November 2, 2019, Ms. Berry went out for her birthday celebration in San Jose. Dkt. No. 27 ¶ 8. Ladonna Jackson, Ms. Berry's friend, drove Ms. Berry from her home in Oakland and the two women stopped at a gas station once they reached San Jose. *Id.* ¶¶ 8, 9. Ms. Berry alleges that "[w]ith no warning," San Jose Police Officer Clare Johnson and defendant Officer Parodi pulled their police cruiser behind the car in which Ms. Jackson and Ms. Berry were sitting. *Id.* ¶ 9. Officers Johnson and Parodi, both described as "white female[s]," allegedly were part of a police unit that specializes in enforcing laws against prostitution. *Id.* Before Ms. Jackson or Ms. Berry exited the car to buy gas, the officers reportedly approached them, demanded identification "and made it clear that Ms. Jackson and [Ms. Berry] were being detained and were not free to leave." *Id.*

Ms. Berry says she called 911 and requested assistance because "she became frightened that she, a black woman doing nothing wrong, might become a victim of police violence[.]" *Id.* The 911 operator reportedly told Ms. Berry that there was nothing she could do to help her and hung up. Officer Johnson approached the driver's side of the car, while Officer Parodi approached the passenger side where Ms. Berry was sitting. Ms. Berry says that "[b]ecause she had been racially profiled in the past by San Jose law enforcement, was doing absolutely nothing wrong or illegal, and was frightened, [she] immediately began using her cell phone to video record the encounter and advised [Officer] Parodi she was doing so." *Id.*

According to the FAC, Officer Parodi "changed her attitude toward [Ms. Berry] and seemingly became enraged" when she saw that Ms. Berry was recording the encounter and "told [Ms. Berry] to put her phone down, so as to prevent [Ms. Berry] from continuing to video and audio record the encounter." *Id.* ¶ 10. Officer Parodi allegedly demanded Ms. Berry's identification "in an unnecessarily loud and aggressive voice," and Ms. Berry says that she complied by providing her name and California driver's license number. *Id.* But the FAC alleges that Officer Parodi pretended that Ms. Berry had not cooperated and, "in a loud and threatening

1 voice” demanded that she exit the car, “while [Ms. Berry] asked what she had done wrong, and
2 protested that she had done nothing wrong.” *Id.*

3 The FAC further alleges that “[i]nstead of explaining her concerns or even asking [Ms.
4 Berry] what she and Ms. Jackson were doing at the gas station,” Officer Parodi “reached inside the
5 half open passenger window, and unlocked and opened the passenger door.” *Id.* ¶ 11. “Still
6 protesting that she had done nothing wrong,” Ms. Berry says that she was attempting to comply
7 with Officer Parodi’s requests to exit the car; but her movements were awkward and slower than
8 usual because she was still holding her cell phone to record the incident, which Ms. Berry felt
9 “was a form of insurance for her safety during the encounter.” *Id.* Once the passenger door was
10 opened, Officer Parodi allegedly applied a pain compliance hold on Ms. Berry’s right wrist,
11 violently pulled her from the car, and threw her on the concrete floor of the gas station. *Id.*

12 Ms. Berry believes that Officer Parodi “intentionally retaliated against [her] for attempting
13 to audio and video record the encounter and for protesting that she had done nothing wrong.” *Id.*
14 She further “alleges that the more she protested her innocence of any wrongdoing, the more
15 violent and aggressive [Officer] Parodi became towards her.” *Id.* According to the FAC, Ms.
16 Berry briefly lost consciousness when Officer Parodi threw her to the ground. Officer Parodi also
17 reportedly punched Ms. Berry and used elbow strikes on her head, face and torso, and then placed
18 her knee on Ms. Berry’s neck and handcuffed her. *Id.* ¶¶ 11, 12.

19 After Ms. Berry was arrested and handcuffed, a San Jose police officer, identified in the
20 FAC only as Sergeant “White,” arrived with around 20 other officers. *Id.* ¶ 13. Sergeant White
21 and the other officers allegedly laughed and ignored Ms. Berry’s pleas for help, and Sergeant
22 White reportedly “was dismissive” of Ms. Berry’s complaint about Officer Parodi’s conduct. *Id.*
23 Ms. Berry alleges that no law enforcement officer—including Officer Parodi, Officer Johnson, and
24 Sergeant White—mentioned anything to her or to Ms. Jackson about alleged solicitation or
25 prostitution at any point during the encounter. *Id.* Ms. Berry was not charged with prostitution or
26 a related crime, and she says that at no time did Officer Parodi or any other law enforcement
27 officer arrest her for any prostitution-related activity. Reportedly, no officer read Ms. Berry her
28 *Miranda* rights. *Id.*

Officer Parodi allegedly pulled Ms. Berry up from the ground, pulled her to the police cruiser, and instructed her to enter the back of the cruiser. But when Ms. Berry was unable to seat herself with her hands cuffed, Officer Parodi allegedly “entered the back seat from the opposite side of the car and pulled [Ms. Berry] by her arms across the seat in a prone position, despite [Ms. Berry’s] pain and discomfort.” *Id.* at ¶ 14. “In short,” Ms. Berry says that “throughout the encounter,” Officer Parodi “engaged in every conceivable action to cause [Ms. Berry] pain and suffering, in retaliation for [Ms. Berry]’s initial recording of the encounter.” *Id.*

The FAC alleges that Officer Parodi’s subsequent claim that she believed Ms. Berry was engaged in prostitution is “a sham and fabricated reason to first detain, then beat, and finally arrest [Ms. Berry].” *Id.* Here, Ms. Berry alleges that Officer Parodi did not examine the contents of Ms. Berry’s purse (and did not, in any event, ask for Ms. Berry’s consent) to search for any evidence of prostitution activity “like condoms, sexual aides, and cash.” *Id.* Instead, Officer Parodi allowed Ms. Jackson to drive away from the scene with Ms. Berry’s purse in her car. *Id.* However, Ms. Berry says that Officer Parodi did confiscate her cell phone and searched its contents, without a warrant or Ms. Berry’s consent. *Id.* ¶ 15. Officer Parodi reportedly also “contacted and threatened” Ms. Berry’s elderly mother, who lives in Texas, causing Ms. Berry “even greater fear, embarrassment, and humiliation.” *Id.*

Ms. Berry says she “was in severe pain from her shoulders, clavicle, ribs, torso and arms,” and was taken to a hospital for treatment. *Id.* ¶ 16. While there, she claims that Officer Parodi “repeatedly taunted” her; “engaged unnecessary, unwanted, and inappropriate touching of [Ms. Berry’s] body”; encouraged another patient to taunt and threaten Ms. Berry and gave that patient Ms. Berry’s home address; told Ms. Berry that she looked or dressed like a “hooker;” told Ms. Berry, in the presence of a male nurse, that if Ms. Berry needed to use the restroom she was going to have to “get naked” in front of Officer Parodi; and “threatened to force [Ms. Berry] to pull down her pants and underwear, and urinate in a plastic basin while [Officer] Parodi and male hospital attendants watched.” *Id.* When making these comments, Officer Parodi allegedly “laughed, licked her lips, and made offensive and inappropriate comments.” *Id.* When Officer Parodi left the area for a few minutes when summoned to speak with Sergeant White, her police

1 partner Officer Johnson allegedly removed Ms. Berry's handcuffs, allowed her to use the
2 restroom, apologized for Officer Parodi's behavior, and admitted that Officer Parodi was wrong in
3 her treatment and arrest of Ms. Berry. *Id.*

4 After hospital staff determined that Ms. Berry was in stable condition, she was transported
5 to the Santa Clara County jail where she remained incarcerated overnight. *Id.* Officer Parodi
6 allegedly "threatened to transport [Ms. Berry] wrapped in a blanket from the hospital to jail,"
7 accused Ms. Berry of drug use, requested that hospital staff test Ms. Berry for drugs even though
8 Ms. Berry says she is not a drug user, and "threatened to have [Ms. Berry] tranquilized as
9 retaliation for [Ms. Berry's] protestations of innocence." *Id.*

10 Ms. Berry was released from custody the following morning at dawn, and Ms. Jackson
11 drove her back home to Oakland. Ms. Berry alleges that she "was in such pain from the injuries
12 inflicted by [Officer] Parodi that she could not pick up or hold her children to breastfeed them for
13 approximately three months after the encounter." *Id.* ¶ 17. Ms. Berry further alleges that after
14 arriving home, she observed Officer Parodi sitting in and then standing outside of a pickup truck
15 less than one block from her home, and "was terrified that [Officer] Parodi was stalking her with
16 bad intent," and feared for her safety and that of her children. *Id.* ¶ 19.

17 According to the FAC, Officer Parodi later falsely claimed in her police report that Ms.
18 Berry ducked when she saw officers approaching. Ms. Berry maintains that Officer Parodi's
19 "body worn camera footage of the incident shows to the contrary, that [Ms. Berry] sat upright and
20 made no attempt to hide herself from the officers' view." *Id.* ¶ 9. Defendant Parodi allegedly also
21 falsely reported that Ms. Berry provided information when asked for identification, "but could not
22 be recorded," and that she needed to remove Ms. Berry from the car because of Ms. Berry's
23 "furtive movements and . . . [Officer Parodi] could not see what was on the floor of the car." *Id.*
24 ¶ 10. The FAC alleges that Officer Parodi's body-worn camera footage "shows otherwise" and
25 that Ms. Berry "limited her movements in the car to raising her hands to demonstrate to [Officer]
26 Parodi that she had no weapon or anything threatening to the officers, and in fact, nothing in her
27 hands except the cell phone with which she was recording the incident." *Id.* Officer Parodi's
28 police report also allegedly "falsely accused, but did not charge, [Ms. Berry] of being in San Jose

1 for the purposes of prostitution, a claim she never once asked about or accused [Ms. Berry] of
 2 during the encounter and arrest.” *Id.* ¶ 18. Ms. Berry believes that Officer Parodi “racially
 3 profiled [her] and her friend [Ms.] Jackson because they are African American, and because [Ms.
 4 Berry] was dressed up for her birthday party, believed that she was a prostitute, treated her as
 5 though she was a prostitute and sought to detain and then arrest her for prostitution, not because
 6 there was any cause to believe, or any evidence, that she was prostituting, but only because she is
 7 black.” *Id.*

8 Ms. Berry was not detained or arrested for prostitution or any related offense, but was
 9 instead charged with a misdemeanor for resisting arrest. *Id.* According to the FAC, that charge
 10 was dismissed after Ms. Berry refused to accept a plea and after her criminal defense attorneys
 11 sought discovery of any records concerning Officer Parodi’s prior wrongful acts. *Id.* ¶¶ 18, 20.

12 Ms. Berry filed the present action against the City of San Jose and Officer Parodi on
 13 October 29, 2021.³ The complaint asserted seven claims for relief under 42 U.S.C. § 1983:
 14 (1) excessive force (against Officer Parodi); (2) unlawful detention (against Officer Parodi and the
 15 City); (3) false arrest (against Officer Parodi and the City); (4) unlawful search and seizure
 16 (against Officer Parodi and the City); (5) malicious prosecution (against all defendants);⁴ (6) First
 17 Amendment violation (against all defendants); and (7) *Monell* claim (against the City). Dkt. No.
 18 1.

19 Defendants initially moved to dismiss the fourth through seventh claims for relief, arguing
 20 that Ms. Berry failed to plead sufficient facts to establish municipal liability and otherwise failed
 21 to plead facts supporting a plausible claim for relief. Dkt. No. 20. Defendants’ motion was
 22 mooted when Ms. Berry timely filed her FAC as of right under Rule 15(a). Dkt. No. 27. The
 23

24 ³ Although titled a “Complaint for Damages,” Ms. Berry docketed her original pleading as an
 25 “Amended Complaint” (Dkt. No. 1), followed by a second seemingly identical “Complaint” (Dkt.
 26 No. 2). At the initial case management conference, her counsel confirmed that he was not aware
 of any amended pleading and confirmed that the complaint docketed as Dkt. No. 1 is the operative
 pleading. Dkt. No. 22.

27 ⁴ At the motion hearing, Ms. Berry confirmed that claims asserted against “All Defendants” are
 28 against the City and Officer Parodi, and not against some other as yet unknown and unnamed
 defendants. Dkt. No. 35.

1 FAC asserts the same seven claims for relief asserted in the original complaint.

2 Defendants now move to dismiss Ms. Berry’s fifth (malicious prosecution), sixth (First
3 Amendment), and seventh (*Monell*) claims for relief pursuant to Rule 12(b)(6), arguing that the
4 FAC still fails to plead sufficient facts establishing municipal liability and otherwise fails to state a
5 plausible claim for relief.⁵ Upon consideration of the moving and responding papers, the Court
6 grants defendants’ motion to dismiss Claim 7 (and Claims 2-6) against the City, as well as Claim 5
7 for malicious prosecution, with leave to amend. Officer Parodi’s motion to dismiss Claim 6 for
8 retaliation under the First Amendment is denied.

9 **II. LEGAL STANDARD**

10 A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal
11 sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
12 Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts
13 alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep’t*, 901
14 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be
15 taken as true and construed in the light most favorable to the claimant. *Id.*

16 However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover,
18 “the court is not required to accept legal conclusions cast in the form of factual allegations if those
19 conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*
20 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

21 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the
22 pleader is entitled to relief.” This means that the “[f]actual allegations must be enough to raise a
23 right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
24 (2007) (citations omitted). However, only plausible claims for relief will survive a motion to
25 dismiss. *Iqbal*, 556 U.S. at 679. A claim is plausible if the facts pled permit the court to draw a
26 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* A plaintiff does
27

28 ⁵ Officer Parodi no longer seeks dismissal of Ms. Berry’s fourth claim for relief for unlawful search and seizure.

not have to provide detailed facts, but the pleading must include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678.

III. DISCUSSION

A. Claim 7: *Monell*

The Court turns first to the *Monell* claim and concludes that Claim 7 and all other claims asserted against the City (i.e., Claims 2-6) should be dismissed for failure to plead sufficient facts establishing a plausible claim for relief.

Local governments are “persons” subject to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional tort. *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 690 (1978). However, a city or county may not be held vicariously liable for the unconstitutional acts of its employees under the theory of *respondeat superior*. *See Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691; *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir.1995). “Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” *Monell*, 436 U.S. at 694. “The ‘official policy’ requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

To impose municipal liability under § 1983 for a violation of constitutional rights, a plaintiff must show that: (1) the plaintiff possessed a constitutional right of which he or she was deprived; (2) the municipality had a policy; (3) this policy amounts to deliberate indifference to the plaintiff’s constitutional rights; and (4) the policy is the moving force behind the constitutional violation. *See Plumeau v. School Dist. # 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir.1997). Liability based on a municipal policy may be satisfied in one of three ways: (1) by demonstrating that a municipal employee committed the alleged constitutional violation under a formal governmental policy or longstanding practice or custom that is the customary operating procedure of the local government entity; (2) by demonstrating that the individual who committed the

1 constitutional tort was an official with final policymaking authority and that the challenged action
 2 itself was an act of official governmental policy which was the result of a deliberate choice made
 3 from among various alternatives, or (3) by proving that an official with final policymaking
 4 authority either delegated policymaking authority to a subordinate or ratified a subordinate's
 5 unconstitutional decision or action and the basis for it. *Gillette v. Delmore*, 979 F.2d 1342, 1346-
 6 47 (9th Cir.1992), *cert. denied*, 510 U.S. 932 (1993). “In order to withstand a motion to dismiss
 7 for failure to state a claim, a *Monell* claim must consist of more than mere formulaic recitations of
 8 the existence of unlawful policies, customs, or habits.” *Johnson v. City of San Jose*, — F. Supp.
 9 3d —, No. 21-cv-01849-BLF, 2022 WL 799424, at *11 (N.D. Cal. Mar. 16, 2022) (internal
 10 quotations and citation omitted).

11 **a. Custom, Policy, or Practice Allegations**

12 A municipality may be held liable on the basis of an unconstitutional policy if the plaintiff
 13 is “able to prove the existence of a widespread practice that, although not authorized by written
 14 law or express municipal policy, is ‘so permanent and well settled as to constitute a ‘custom or
 15 usage’ with the force of law.’” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting
 16 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)). Such a policy may be evidenced by
 17 a pattern of similar acts or incidents. *Gillette*, 979 F.2d at 1349. Proof of random acts or isolated
 18 incidents, however, are insufficient to establish custom, *Trevino v. Gates*, 99 F.3d 911, 918 (9th
 19 Cir.1996), and “[a] single constitutional deprivation ordinarily is insufficient to establish a
 20 longstanding practice or custom,” *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999).
 21 However, an isolated constitutional violation may be sufficient to establish a municipal policy
 22 where (1) “the person causing the violation has ‘final policymaking authority,’” (2) “the final
 23 policymaker ‘ratified’ a subordinate’s actions,” or (3) “the final policymaker acted with deliberate
 24 indifference to the subordinate’s constitutional violations.” *Christie*, 176 F.3d at 1235, 1238,
 25 1240.

26 Ms. Berry alleges that the City “does not have policies and procedures in place sufficient
 27 to deter, inhibit or prevent the type of unlawful conduct employed by [Officer] Parodi [i]n the
 28 detention and arrest of [Ms. Berry], including but not limited to the use of excessive force” and

“does not [sic] have adequate policies[,] procedures and training in place to supervise the conduct of its officers, as evidenced [sic] by Sergeant White’s inaction during the incident described above.” Dkt. No. 27 ¶¶ 41, 42.⁶ The FAC further alleges, on information and belief, that Officer Parodi “was not required to, and did not record her use of force against [Ms. Berry], and that Sergeant White was aware of and/or observed [Officer] Parodi’s excessive use of force and/or her unlawful detention of [Ms. Berry], and took no action to train, retrain, supervise or correct [Officer] Parodi’s actions.” *Id.* ¶ 41. The FAC, however, contains no factual allegations beyond the incident involving Ms. Berry and essentially alleges that in light of Officer Parodi’s alleged misconduct, the City must have violated Ms. Berry’s constitutional rights. These allegations are insufficient to establish a plausible *Monell* claim based on the existence of a policy (or lack thereof) that was widespread or so permanent and well settled as to constitute a custom, policy or practice with the force of law. *See Estate of Adomako v. City of Fremont*, No. 17-cv-06386-DMR, 2018 WL 2234179, at *3 (N.D. Cal. May 16, 2018) (concluding that the plaintiff failed to sufficiently allege a pattern, policy, or custom where the complaint only alleged facts pertaining to the incident involving the plaintiff).

b. Ratification

To the extent the FAC appears to allege *Monell* liability based on a ratification theory, the allegations also fall short. To show ratification, a plaintiff must show that the “authorized policymakers approve a subordinate’s decision and the basis for it.” *Christie*, 176 F.3d at 1239 (quoting *Praprotnik*, 485 U.S. at 127). While a single decision by a municipal final policymaker may be sufficient to trigger liability under *Monell*, such liability attaches only where “a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.” *Pembaur*, 475 U.S. at 483.

In the present case, Ms. Berry alleges that the City “by and through police supervisor Sergeant White, authorized and ratified the unlawful arrest and detention of [Ms. Berry] by

⁶ The FAC contains duplicative numbering for the paragraphs appearing under Claims 6 and 7. In this portion of the order, the Court refers to the set of paragraphs appearing under Claim 7.

[Officer] Parodi, and authorized and ratified the use of excessive force by [Officer] Parodi,” and that “Sergeant White was aware of and/or observed [Officer] Parodoi’s excessive use of force and/or her unlawful detention of [Ms. Berry], and took no action to train, retrain, supervise or correct [Officer] Parodi’s actions.” Dkt. No. 27 ¶¶ 40, 41. These allegations are entirely conclusory, including with respect to Sergeant White’s role as a “final policymaker” and the basis for his alleged ratification of Officer Parodi’s conduct. Moreover, “[a] mere failure to overrule a subordinate’s actions, without more, is insufficient to support a § 1983 claim.” *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004). *See Rasku v. City of Ukiah*, 460 F. Supp. 3d 934, 945 (N.D. Cal. 2020) (same); *Estate of Adomako*, 2018 WL 2234179 at *3 (“A police department’s ‘mere failure to discipline its officers does not amount to ratification of their allegedly unconstitutional actions.’”) (quoting *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014), *rev’d in part, cert. dismissed in part*, 575 U.S. 600 (2015)).

c. Failure to Train Allegations

“In limited circumstances, a local government’s decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011). “A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.” *Id.* A municipality may be held liable based on a failure to train only where it “amount[s] to ‘deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’” *Id.* (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)). Deliberate indifference “is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” *Id.* (internal quotations and citation omitted). “This standard is met when ‘the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.’” *Johnson*, — F. Supp. 3d —, 2022 WL 799424, at *10 (quoting *City of Canton*, 489 U.S. at 390). “While deliberate indifference can be inferred from a single incident when ‘the unconstitutional consequences of failing to train’ are ‘patently obvious,’ an inadequate training policy itself cannot

1 be inferred from a single incident.” *Hyde v. City of Wilcox*, 23 F.4th 863, 874-75 (9th Cir. 2022)
 2 (quoting *Connick*, 563 U.S. at 61). Thus, “[a] pattern of similar constitutional violations by
 3 untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes
 4 of failure to train.” *Connick*, 563 U.S. at 62; accord *Johnson*, , — F. Supp. 3d —, 2022 WL
 5 799424 at *10.

6 Ms. Berry’s allegations about the City’s purported failure to train or inadequate training
 7 are entirely conclusory. See Dkt. No. 27 ¶ 43 (“Plaintiff is informed and believes and thereupon
 8 alleges that neither [Officer] Parodi or Sergeant White were disciplined, trained, or retrained after
 9 the incident described herein, and that the failure to train or retrain is due to inadequate policies of
 10 the CITY.”), ¶ 44 (“Defendants’ conduct was the proximate cause of harm and damage to
 11 Plaintiff, and by reason of the foregoing alleged acts and conduct Plaintiff is entitled to damages
 12 against Defendants all according to proof at trial.”).

13 In sum, Ms. Berry’s FAC fails to allege sufficient facts to establish a plausible *Monell*
 14 claim against the City based on a custom, policy or practice, retaliation, or failure to train.
 15 Accordingly, the City’s motion to dismiss Claim 7, as well as Claims 2-6, is granted.

16 The Court now turns to the two remaining claims at issue—Claims 5 and 6—against
 17 Officer Parodi.

18 **B. Claim 5: Malicious Prosecution**

19 In the Ninth Circuit, “the general rule is that a claim of malicious prosecution is not
 20 cognizable under 42 U.S.C. § 1983 if process is available within the state judicial system to
 21 provide a remedy.” *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). “However,
 22 an exception exists to the general rule when a malicious prosecution is conducted with the intent
 23 to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a
 24 denial of constitutional rights.” *Id.* (internal quotations and citations omitted); see also *Freeman v.*
 25 *City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995) (“[T]o prevail, [a plaintiff] must show that
 26 the defendants prosecuted her with malice and without probable cause, and that they did so for the
 27 purpose of denying her equal protection or another specific constitutional right.”). The Ninth
 28 Circuit looks to California law when analyzing § 1983 claims for malicious prosecution. *Awabdy*

1 v. *City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004). “In California, the elements of
 2 malicious prosecution are (1) the initiation of criminal prosecution, (2) malicious motivation, and
 3 (3) lack of probable cause.” *Usher*, 828 F.2d at 562. Thus, to plead a malicious prosecution claim
 4 under Section 1983, a plaintiff must allege: (1) the initiation of a prosecution which ended in a
 5 termination favorable to the plaintiff; (2) lack of probable cause; (3) malice; and (4) that the
 6 prosecution was conducted with the intent to deprive the plaintiff of specific constitutional rights.
 7 *See Awabdy*, 368 F.3d at 1066; *Freeman*, 68 F.3d at 1189; *Usher*, 828 F.2d at 562.

8 The Court agrees that Ms. Berry’s FAC fails to sufficiently describe the basis for Officer
 9 Parodi’s liability under a malicious prosecution theory.⁷ The FAC indicates that Ms. Berry seeks
 10 to hold Officer Parodi liable for malicious prosecution based on the allegedly unlawful detention,
 11 arrest, and search/seizure. *See* Dkt. No. 27 ¶ 40 (“The acts and omissions of the defendants as
 12 described herein, and by wrongfully detaining and/or arresting and prosecuting Plaintiff without
 13 cause, violated Plaintiff’s rights under the laws and Constitution of the United States including but
 14 not limited to her right to be free from unreasonable searches and seizures and wrongful
 15 prosecution, as guaranteed by the Fourth Amendment to the United States Constitution.”). The
 16 body of the FAC also alleges that Officer Parodi’s police report of the incident is false. *See id.*
 17 ¶¶ 9, 10, 18. What remains unclear, however, is how this conduct necessarily correlates with or
 18 contributed to the subsequent misdemeanor charge and prosecution against Ms. Berry for resisting
 19 arrest. Officer Parodi’s motion to dismiss this claim is granted.

20 C. Claim 6: First Amendment

21 To plead a claim for First Amendment retaliation, Ms. Berry must allege facts showing
 22 that (1) she was engaged in a constitutionally protected activity; (2) the defendants’ actions would
 23 chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) the
 24 protected activity was a substantial or motivating factor in the defendants’ conduct. *O’Brien v.*

25
 26 ⁷ Assuming Ms. Berry can amend the FAC to state a plausible claim for malicious prosecution, the
 27 Court is not persuaded that the malicious prosecution claim necessarily must be dismissed as
 28 duplicative of Ms. Berry’s claims for unlawful detention and arrest. *See Awabdy*, 368 F.3d at
 1072 (“In this circuit, nothing prevents *Awabdy* from bringing both malicious prosecution and
 direct First and Fourteenth Amendment claims in the same § 1983 action.”).

1 *Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (citations omitted). “To prevail on such a claim, a
 2 plaintiff must establish a ‘causal connection’ between the government defendant’s ‘retaliatory
 3 animus’ and the plaintiff’s ‘subsequent injury.’” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019)
 4 (quoting *Hartman v. Moore*, 547 U.S. 250, 259 (2006)). “It is not enough to show that an official
 5 acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the
 6 injury. Specifically, it must be a ‘but-for’ cause, meaning that the adverse action against the
 7 plaintiff would not have been taken absent the retaliatory motive.” *Id.*; *see also Lacey v.*
 8 *Maricopa Cnty.*, 693 F.3d 896, 917 (9th Cir. 2012) (“[Plaintiff] must allege facts ultimately
 9 enabling him to prove the elements of retaliatory animus as the cause of injury,’ with causation
 10 being ‘understood to be but-for causation.’”) (quoting *Hartman*, 547 U.S. at 260)).

11 Ms. Berry’s alleged protected activity is her recording of the law enforcement encounter
 12 and her protestations of innocence. *See* Dkt. No. 27 ¶¶ 14, 16. On the present motion, Officer
 13 Parodi does not challenge the first two elements of Ms. Berry’s First Amendment retaliation
 14 claim. She argues that this claim should be dismissed because the FAC fails to allege sufficient
 15 facts demonstrating but-for causation, i.e., that Ms. Berry’s protected activity was a substantial or
 16 motivating factor in Officer Parodi’s alleged conduct. Specifically, Officer Parodi says that the
 17 FAC’s allegations indicate that Ms. Berry did not initially comply with her request for
 18 identification and instead “immediately began using her cell phone to video record the
 19 encounter[.]” Dkt. No. 27 ¶ 9; Dkt. No. 31 at 8-9. Officer Parodi contends that Ms. Berry’s non-
 20 compliance with the request for identification, rather than any alleged protected activity, may have
 21 been the reason for the alleged subsequent conduct. The FAC, however, also alleges other facts
 22 suggesting that Officer Parodi’s alleged conduct was motivated by Ms. Berry’s recording of the
 23 encounter and her protestations of innocence. For example, the FAC alleges that Officer Parodi’s
 24 demeanor changed when Ms. Berry began recording the incident with her cell phone; that Ms.
 25 Berry was attempting to comply with Officer Parodi’s requests, but moved awkwardly and slowly
 26 because she was still holding her phone to record the incident; and that the more Ms. Berry
 27 protested her innocence of any wrongdoing, the more violent and aggressive Officer Parodi
 28 became. Dkt. No. 27 ¶¶ 10, 11. Crediting Ms. Berry’s allegations as true, and construing them in

a light most favorable to her, the Court finds that the FAC alleges sufficient facts to plead but-for causation in support of Ms. Berry's retaliation claim. Officer Parodi's motion to dismiss this claim is denied.

IV. LEAVE TO AMEND

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," because "the court must remain guided by the underlying purpose of Rule 15 . . . to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). "The decision of whether to grant leave to amend nevertheless remains within the discretion of the district court," which may deny leave to amend if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the party seeking amendment has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

On the present record, the Court cannot rule out the possibility that Ms. Berry may be able to plausibly allege facts supporting municipal liability and her claim for malicious prosecution. Accordingly, the Court will give her leave to amend.

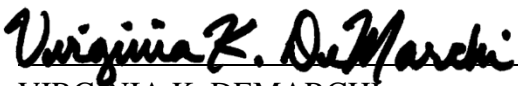
V. CONCLUSION

Based on the foregoing, defendants' motion to dismiss the FAC is granted in part and denied in part as follows: Claims 2-7 are dismissed as to the City. Claim 5 is also dismissed as to Officer Parodi. Officer Parodi's motion to dismiss Claim 6 is denied.

Ms. Berry is given leave to amend to state a basis for municipal liability as to Claims 2-7 against the City. Ms. Berry is also given leave to amend Claim 5 with respect to Officer Parodi. If she chooses to amend her pleading, Ms. Berry shall file her Second Amended Complaint by **June 3, 2022**.

IT IS SO ORDERED.

Dated: May 19, 2022


VIRGINIA K. DEMARCHI
United States Magistrate Judge